

IN RE: MILFORD LIMITED : Representation Petition
: :
CONTRACT PERSONNEL : No. 94-11-109

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James D. Griffin, Esq., Griffin & Hackett, for Milford School District*

The Milford School District (hereinafter "District" or "Respondent") is a public school employer within the meaning of Section 4002(n), of the Act. The Milford Education Association, DSEA/NEA (hereinafter "Association" or "Petitioner") is the exclusive representative of the bargaining unit of the District's certificated professional employees within the meaning of Section 4002(i) of the Public School Employment Relations Act, 14 Del.C. Ch. 40 (Supp. 1990, hereinafter "Act").

The Milford School District currently employs approximately 155 limited contract positions essentially in the following areas: (1) interscholastic and intramural athletic coaches; (2) advisors to student clubs and activities such as yearbook, band, student council, prom and the school newspaper; (3) department chairpersons; (4) after-school instruction for talented and gifted elementary students; and (5) miscellaneous other positions such as computer laboratory supervisor, audio-visual director and detention hall supervisor.

The Petitioner seeks to add the limited contract positions which are currently unrepresented to the existing bargaining unit comprised exclusively of certificated professional employees (essentially teachers) within the Milford Education Association. The petition is properly supported by cards bearing signatures of at least 30% of the limited contract personnel, as required by Section 4011(a), of the Act.

The District opposes the Petition for the reason that limited contract positions are not appropriate for inclusion in a bargaining unit of certificated professional employees.

Following three (3) days of hearing, the parties filed post-hearing briefs with the final brief received on November 13, 1995.

ISSUE

Whether the limited contract positions in the Milford School District are appropriate under the statutory criteria set forth in Section 4010(d), of the Act for inclusion in the current bargaining unit of certificated professional employees?

PRINCIPAL POSITIONS OF THE PARTIES

Association:

Similarity of Duties, Skills and Working Conditions:

The Association argues that the two (2) groups of employees share strong similarity in the duties, skills and working conditions. In support of its position, the Association cites the following factors: (1) student contact in activities related either directly or indirectly to the academic curriculum or in coordinating academic activities; (2) a preference that teachers fill limited contract positions; (3) most limited contract positions are filled by certificated teachers who are members of the existing bargaining unit; (4) teaching skills are required in most, if not all, limited contract positions; (5) both groups are paid at least in part from local funds; (6) both

groups perform responsibilities outside the regular school day; and (7) both groups work primarily on the school premises.

History and Extent of the Employee Organization:

The Association maintains that it has attempted for years to bargain on behalf of the limited contract employees, without success.

Recommendations of the Parties Involved:

The Association maintains that most of the employees holding limited contract positions are already teachers in the professional employees' bargaining unit and desire to be represented by the Association insofar as their limited contract responsibilities are concerned.

Effects of Overfragmentation:

The Association maintains that because the District already bargains with three (3) bargaining units, absorbing the limited contract employees into the existing unit of teachers is preferable to creating a fourth unit. The logic of doing so is further supported by the fact that most of the limited contract employees are already in the existing unit.

Such Other Factors as the PERB Deems Appropriate:

The Union maintains that almost every other school district in the State bargains about limited contract positions as part of its negotiations with teachers.

District:

Dissimilarity of Skills, Duties and Working Conditions

The District argues that the limited contract employees: (1) perform their responsibilities outside the standard 7 1/2 hour school day; (2) are casual or seasonal and hired only for the duration of the activity involved; (3) are paid exclusively from

local funds; (4) are created by Board policy and are discretionary; (5) are paid by Board policy; (6) are not involved in the delivery of instruction related to subject areas taught during the regular school day; (7) are not required to be certified; (8) are primarily involved in administering interscholastic and intramural athletic programs; (9) are not required to attend in-service training; (10) are not required to attend professional staff meetings; (11) are not involved in monitoring student progress or grading performance in curriculum based instruction; (12) receive no fringe benefits; do not work with a professional employee; (13) are not formally evaluated; (14) are hired for less than a full year; and do not renew annually; (15) are not required to perform the minimum duties required of teachers; and (16) do not, for the most part, have job descriptions.

History and Extent of Employee Organization:

The District argues that until the Act was amended in 1989, to include support personnel, a football coach was not considered to be a professional position. Leone v. Kimmel, Del.Super. 335 A.2d 290 (1975). Consistent with the Leone decision, limited contract positions were excluded from the professional bargaining unit by the recognition clause of the collective bargaining agreement. Consequently, there is no bargaining history in the Milford School District supporting the inclusion of limited contract positions in the bargaining unit of professional employees.

Recommendations of the Parties Involved:

The District argues that because of dissimilar interests and the absence of curriculum based instruction limited contract positions are not appropriate for inclusion in the existing bargaining unit comprised exclusively of certificated professional employees.

Effect of Overfragmentation:

The District argues that because of the large number of limited contract positions and three (3) existing bargaining units included within one (1) consolidated contract, overfragmentation is not a factor.

Such Other Factors as the PERB Deems Appropriate:

The District maintains that the other public school district's which negotiate on behalf of limited contract positions do so on a limited basis primarily related to salary increases. In Milford, increases for limited contract positions historically are the same as those of the professional employees.

OPINION

Prior to July, 1989, the jurisdiction of the PERB under the Public School Employment Relations Act, 14 Del.C. Ch. 40, extended exclusively to certificated professional employees of the State's public school districts excluding administrators. In 1990, coverage of the Act was expanded to include "any employee of a public school employer except public school administrators and confidential employees of a public school employer..." Section 4010(d) of the Act, sets forth the statutory criteria for determining the scope of an appropriate bargaining unit. Section 4010, Bargaining Unit Determination, provides, in relevant part:

(d) In making its determination as to the appropriate bargaining unit, the Board or its designee shall consider such factors as the similarity of duties, skills and working conditions of the employees involved; the history and extent of the employee organization; the recommendations of the parties involved; the effects of overfragmentation of bargaining units on the efficient administration of government; and such other factors as the Board may deem appropriate...

Subsequent to 1989, the PERB has considered three (3) petitions seeking to incorporate non-certified support personnel into existing bargaining units of

certified professional employees. Each of these cases, cited by both the Association and the District in support of their respective positions, is summarized below:

In Lake Forest Ed. Assn. v. Bd. of Ed., (Del.PERB, Rep. Pet. No. 91-03-060 (1991)), the Association petitioned the PERB to combine an existing bargaining unit comprised of secretaries, clerks, custodians and aides with the existing bargaining unit of certificated professional employees.

The evidence in the Lake Forest case established that significantly different duties, skills and qualifications were required of the professional and classified employees. The decision referenced differences in the reporting relationships, the evaluation process, job security, tenure, basis and method of payment.

The divergent groups of employees which the petition sought to merge received particular attention. In rejecting the petition, the hearing officer concluded that:

Many factors impact the determination of an appropriate unit and none alone is determinative. Of particular importance when grouping employees together into an appropriate bargaining unit is that they share similar responsibilities, duties and skills. These factors are entitled to even greater weight when the issue involves the intermingling of professional and non-professional employees. It is these considerations which are critically lacking when comparing the professional and classified employees whom the Association seeks to combine into one bargaining unit.

In a decision issued on January 31, 1991, the Board for the first time combined certificated professional employees and classified employees into one bargaining unit. Kent County Vo-Tech Special Ed. Instructional Aides, Del.PERB, Rep. Pet. No. 91-06-065 (1991). The Association petitioned the PERB to include five (5) unorganized Special Education Instructional Assistants in an existing unit of certificated professional employees. The District opposed the petition essentially for the reason

that the dissimilarities of the two (2) groups of employees far outweighed the similarities.

In approving the petition, the hearing officer determined that the assistants played an important role in facilitating the learning process. The teachers and assistants worked side by side as an instructional team providing instruction and guidance in small group settings where the needs of the students were best met. They shared the same student contact hours planning and lunch periods, and worked the same 185 day schedule. Both monitored student achievement in academics and conduct and were responsible for a variety of instructional tasks including reinforcing lessons and skills, administering and grading tests and recording information on individual daily interaction reports for each student.

Because of the small number of instructional aides involved, overfragmentation was not a concern.

In the matter of Caesar Rodney Instructional Aides, Del.PERB, Rep. Pet. No. 92-03-070 (1992), the Association sought to include in the existing bargaining unit of 410 professional employees 43 unorganized instructional aides. The District opposed the petition claiming that: (1) teachers supervise the aides and were, therefore, inappropriate for inclusion in the same unit; and (2) the skills, duties and job responsibilities of instructional aides were substantially different from those of the certificated professional employees.

After determining that the teachers were not supervisors within the meaning of Section 4002(q) of the Act and, therefore, prohibited from being in the same bargaining unit as the aides, the Board ruled that a bargaining unit of professional employees and instructional aides was appropriate, under the Act. Noting that the petition was filed exclusively on behalf of the instructional aides, the hearing officer

relied primarily upon the discussion in Kent County (Supra) concerning the similarities of duties, skills and working conditions of the two (2) groups.

To fully address the issue presented in the current matter, it is necessary to consider the make-up of the 155 limited contract positions in the Milford School District which the Association seeks to merge into the existing unit of professional employees. Approximately 89 involve interscholastic or intramural athletics, 22 (including 16 Department Chairpersons and 6 instructors for talented and gifted students in the elementary schools) involve areas related to the academic curriculum offered by the District, 1 involves Latin, a foreign language (Latin) not offered by the District and the remaining 43 for the most part are club and activity advisors. One hundred and twenty-seven (127) of the 155 limited contract positions are held by teachers.

To date, only in Kent Vo-Tech (Supra) and Caesar Rodney (Supra) has the PERB approved the inclusion of uncertified support employees appropriate in a bargaining unit comprised exclusively of certificated professional employees. In each case, the support employees were instructional aides who, together with the teacher, were an integral part of classroom management and the instruction.

The Association and the District compare and distinguish such other job characteristics as the hours of performance, place of performance, method of payment, performance appraisals and chain of command. While these indicia bear upon appropriateness the critical determination, especially when certificated professional employees and uncertified classified employees are involved is "the similarity of responsibilities, duties and skills." Kent Vo-Tech (Supra)

The fact that teachers are preferred when filling limited contract positions and that in the Milford School District most positions are held by teachers does not

mean that the two (2) groups are appropriate for inclusion in one bargaining unit. In determining an appropriate unit, the relevant job content rather than the qualifications of the incumbent employees is controlling.

In deciding Leone v. Kimmel (Supra), Chancellor Christie observed that "...it is doubtful that an assistant high school football coach is a professional person while acting within that capacity. . . . At best, this work is a form of avocation as to which there are no formal qualifications." Although Leone v. Kimmel was decided prior to enactment of the Public School Employment Relations Act, the observations of Chancellor Christie are still valid and apply equally to other sports, as well. His conclusion is particularly significant since 89 of the limited contract personnel, or 57% of the limited contract employees in the Milford School District, are in sports-related positions.

Numerous exhibits were submitted by the parties including sample job descriptions, Board policies, sample limited contract forms, limited contract salary schedules, a list of individual limited contract positions and more. Employer Exhibit 5, Minimal Job Description For Teachers, is particularly informative. Section A, Minimum Duties (Teachers), provides, in relevant part:

9. Abide by District adopted instructional program objectives (if applicable).
10. Use evaluation techniques to measure student progress based on District adopted instructional program objectives (if applicable).
12. Use general prescriptive procedures based on diagnostic information (if applicable).
13. Use appropriate treatment techniques (instructional activities) based on prior general description (if applicable).
14. Use various techniques (such as, but not limited to, planning classroom management techniques, instructional methods and

communications of subject matter) which are intended to stimulate students concerning their academic work.

15. Use various techniques (such as, but not limited to, planning, classroom management techniques, instructional methods and communications of subject matter) which are intended to stimulate students concerning their school behavior.

(Emphasis added)

These minimum duties serve as examples of the primary difference between instructional and the majority of the limited contract positions. Teachers are primarily responsible for the intellectual and social development of students. Their responsibilities are, for the most part, curriculum driven according to state mandate. Not only do teachers further academic pursuits through teaching, they also monitor, evaluate and test students in their pursuit of academic achievement.

The limited contract personnel voluntarily participate in a specialized area on a limited basis at times other than during the normal school day. The programs offered are neither required nor are they curriculum driven. Rather the number and type of extra-curriculum positions to be offered each year are at the sole discretion of the District. For the most part, academic achievement is not the primary motivation for participating students. Nor are the students monitored, evaluated or tested in order to determine and evaluate their progress and degree of achievement.

Simply put, the similarity in duties, skills and responsibilities of the professional and limited contract positions do not outweigh their diversity so as to justify combining them in a single bargaining unit.

Nor does the history and extent of employee organization warrant joining these two (2) groups of employees in the same bargaining unit. There are currently three (3) bargaining units in the Milford School District: (1) certificated professional employees; (2) teacher assistants; and (3) custodial/maintenance

employees. All three (3) units are covered by one (1) consolidated collective bargaining agreement between the District and the Association. The first ten (10) articles of the current agreement are generic in nature and apply to all three (3) bargaining units. They include: Preamble; Duration of Agreement; Negotiation of Successor Agreement; Understanding of Parties; Grievance Procedure; Non-Discrimination; Liaison Committee; Rights of Milford Education Association; Management Rights; Employee Personnel Files; and, Deduction from Salary.

Thereafter, the provisions concerning each unit are set forth in separate sections. The articles appearing in that portion of the Agreement entitled "Teachers" include: Recognition; Teacher Facilities; Employment Status Information; Teacher Hours; Vacancies; Reduction in Force; Teacher Evaluation; and, Teachers' Rights. It is readily apparent that few, if any, of these provisions, as currently drafted, apply to the limited contract positions. Therefore, placing the limited contract positions into the professional bargaining unit would only complicate the bargaining process.

It is more logical for the limited contract positions to constitute a fourth bargaining unit and for the parties to negotiate a collective bargaining agreement addressing the needs of that particular group of employees rather than to attempt to integrate the limited contract positions into an existing collective bargaining agreement the terms of which are, to a large extent, inapplicable.

DECISION

For the reasons set forth above, it is determined that the petition for bargaining unit of professional and limited contract positions in the Milford School District fails to satisfy the criteria set forth in Section 4010(d), of the Act.

The Petition is, therefore, denied.

IT IS SO ORDERED.

/s/Charles D. Long, Jr.
Executive Director
Del. Public Employment Relations Bd.

/s/Deborah L. Murray-Sheppard
Principal Assistant
Del. Public Employment Relations Bd.

DATED: February 1, 1996